SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1927

No. 718

JOHN FRANCIS CLEMENTS, an Infant,
By JESSE FRANKLIN CLEMENTS,
His Next Friend,

Petitioner,

vs.

CLEVELAND & CHICAGO MOTOR EXPRESS COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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L. E. YOGEL,
GEORGE C. BUNGER,
Of Counsel.

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The jury panel, from which the jurors were drawn, was properly selected by the jury commissioners in accordance with the statutes. There was no deliberate or intentional exclusion of the members of any group, class, race or creed, and the panel actually did represent a true cross-section of the members of the community qualified for jury service under the law. Persons qualified for jury service under the statute naturally have a higher educational background and employment status than the population as a whole. No impropriety in the selection of the panel was shown..... 5

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 755

JOHN FRANCIS CLEMENTS, an Infant,
By JESSE FRANKLIN CLEMENTS,
His Next Friend,
Petitioner,

vs.

CLEVELAND & CHICAGO MOTOR EXPRESS COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

This was a personal injury action. After a full trial in the District Court, the jury returned a verdict for the defendant. A motion for new trial was denied, and judgment was duly entered on the verdict by the trial court (Trans. 137). On appeal by the petitioner (plaintiff), this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. Petitioner now requests this court for a further review by this petition for certiorari.

The only contention made by the petitioner, is that the jury panel from which this jury was drawn, was improperly selected. The only grounds upon which this contention is based, is that the proportion of persons having a high school education or better among the 570 persons in the jury panel from which the jury was drawn, was greater than for the Chicago Metropolitan District as a whole, as shown by the 1940 census, and also, that the jury panel contained a greater proportion of proprietors, managers and professional people, than existed in the population of the Chicago Metropolitan District as a whole as shown by the same census (Trans. 101, et seq., 114, 121, 141).

There is no evidence that there was any deliberate or intentional exclusion of any class or group from the jury panel by the jury commissioners. On the contrary, there is direct evidence that the jury commissioners intended and made every effort to select names for the jury panel which would constitute a fair cross-section of the persons qualified for jury service in the Eastern Division of the Northern District of Illinois (Trans. 110).

The record shows that petitioner's attorney, after examining this particular jury on the *voir dire,* and excusing some of them, stated to the court, "I will accept the jury." (Trans. 7, 40). The trial then proceeded to its conclusion. After a verdict in favor of the defendant, petitioner filed a motion for new trial in which petitioner for the first time contended that the jury panel had been improperly selected (Trans. 39).

ARGUMENT.

I.

The Record Presents No Question for Review.

Petitioner did not object to the composition of the jury and made no motion to strike the panel until after the verdict had been returned, when that objection was raised for the first and only time in the motion for new trial. Thus, the only ruling of the Trial Court claimed to be erroneous is the denial of the motion for new trial. It is settled law that the overruling of a motion for a new trial is not assignable as error, and does not furnish any ground for appeal.

Fishburn v. *C. M. & St. P. Ry. Co.*, 137 U. S. 60, 34 L. Ed. 585

Mo. Pac. R. Co. v. *Chicago & A. R. Co.*, 132 U. S. 191, 33 L. Ed. 309

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II.

Petitioner Waived Any Objection to the Panel of Jurors.

After examining the prospective jurors on the *voir dire* (Trans. 7, et seq.) counsel for petitioner stated in open court, "I will accept the jury." (Trans. 40) Thereafter, the trial proceeded to its conclusion resulting in a verdict and judgment for the defendant, before any objection to the composition of the jury was made. An objection to the *venire* must be made at the first opportunity, and before the case is submitted to the jury. When counsel for petitioner (plaintiff) accepted the jury, he waived any objection thereto.

Agnew v. *U. S.*, 165 U. S. 36, 44; 41 L. Ed. 624, 627

Powers v. *U. S.*, 223 U. S. 303, 312, 56 L. Ed. 448, 452

Veer v. *Hagemann*, 334 Ill. 23, 29

III.

Plaintiff, Though a Minor, Is Bound By the Act of His Counsel in Accepting the Jury.

It was contended below that while the principles just stated would apply in an ordinary case, they do not apply in this case because plaintiff is a minor, represented by his next friend. It is true, that a guardian *ad litem* or next friend has no power or authority to waive the substantial rights of a minor. However, it is well settled that he may bind the minor with respect to matters of procedure, and is authorized to make appropriate arrangements for handling and facilitating the trial.

In *Kingsbury* v. *Buckner*, 134 U. S. 650, 680, 33 L. Ed. 1047, 1059, it was held that the next friend, or guardian *ad litem* of a minor had authority to stipulate for the hearing of a cause by a different division of the Supreme Court of Illinois than that to which it was assigned by law.

In the Matter of Albert N. Moore, 209 U. S. 490, 496, 52 L. Ed. 904, 907, it was held that the next friend of a minor had authority to waive the minor's rights to have a cause remanded from the federal to a state court. The Supreme Court said:

> "That a next friend may select the tribunal in which the suit shall be brought is clear. While he may do nothing prejudicial to the substantial rights of the minor, yet the mere selection of one out of many tribunals having jurisdiction cannot be considered as an act to the latter's prejudice."

In *O'Malley* v. *Marquardt*, 170 Ill. App. 278, 282, it was held that plaintiff's next friend had authority to waive a jury on his behalf and in *Miller* v. *C. & N. W. Ry. Co.*, 301 Ill. App. 386, 389, a minor was held to be bound by the acquiescence of his next friend in a ruling directing a verdict in favor of certain defendants, and his failure to appeal therefrom.

The case at bar falls squarely within the rule announced in the above cases. Plaintiff's counsel accepted the jury, and plaintiff is bound by his act in so doing. At the time he accepted the jury, plaintiff's counsel believed this particular jury to be a fair and proper tribunal for the trial of this cause. All of the facts were available to him at that time. The selection of the jury related to a matter of procedure, not of substance, and its acceptance by plaintiff's counsel was binding on the plaintiff.

IV.

The Jury Panel Was Properly Selected.

The duties of the jury commissioners are specified in Title 28, Section 411, et seq. U.S.C.A. Section 411 provides that jurors to serve in the courts of the United States shall have the same qualifications, and be entitled to the same exemptions, as jurors of the highest courts of law in such state. Section 412 authorizes and directs the jury commissioners to select and place names of qualified jurors in the jury box without reference to party affiliations, the box to contain the names of not less than 300 persons, and provides that all grand and petit jurors shall be returned from such parts of the district as the court shall direct so as to be most favorable to an impartial trial, and not to incur unnecessary expense, or unduly burden the citizens of any part of the district to perform such service. Section 415 provides that no

citizen shall be disqualified for jury service on account of race, coler or previous condition of servitude.

Under these circumstances, it was the duty of the jury commissioner to obtain the names of qualified jurors from various parts of the district and place the same in the jury box. The statute leaves the mechanics of this operation to their discretion. There is not the slightest suggestion that any class or group of the population were deliberately or intentionally excluded from jury service. On the contrary, Mr. Johnson's testimony is that the commissioners attempted and intended to secure a cross-section of the inhabitants of the Eastern Division of the Northern District of Illinois (Trans. 109) and the tabulations in evidence show that the commissioners actually did secure such a cross-section and that no substantial class or group was not represented in the jury box.

The fact that there was a higher percentage of college graduates and a lower percentage of laborers in the jury panel, than is shown by the census for the Chicago Metropolitan District, simply demonstrates that the jury commissioners did their work properly and well. The qualifications for jurors in the State of Illinois are established by Sections 2 and 4 of Chapter 78, Ill. Rev. Stats. Section 2 provides that persons to be qualified as jurors must be between the ages of 21 and 65, in the possession of their natural faculties and not infirm or decrepit, of fair character, approved integrity, sound judgment, well informed and who understand the English language. Section 4 exempts the various public officials and others therein specified including attorneys, ministers of gospel, school teachers, newspaper employees, etc. from jury service. The net effect of these statutes is to disqualify many people for jury service in Illinois in accordance with the express statutory policy of requiring a certain

minimum standard of intelligence, integrity and educational qualifications for jury service. The application of these statutes would necessarily result in a smaller percentage of laborers and poorly educated people, and a higher percentage of well educated persons with responsible positions in the jury box than in the population as a whole. In fact, if the qualifications of those whose names were in the jury box had been, percentagewise, exactly the same as the 1940 census for the Chicago Metropolitan District, it would suggest that the jury commissioners had not performed their duties properly, rather than that they had performed them well.

Furthermore, the Chicago Metropolitan District, as that term is used in the census, consists of the City of Chicago, and parts of Lake, Will and DuPage counties, Illinois, and Lake County, Indiana (Census, p. 203). The Eastern Division of the Northern District of Illinois, on the other hand, includes ten counties of Illinois, namely, Cook, DeKalb, DuPage, Grundy, Lake, LaSalle, McHenry, Kane, Kendall and Will. This trial was held and jury drawn in the year 1946, whereas the census relied on by petitioner relates to the year 1940. The Census, therefore, does not even purport to be representative of the population of the Eastern Division of the Northern District of Illinois at the time this jury panel was drawn.

Substantially the same point as is raised in this case was made and overruled by this court in the case of *Fay* v. *New York*, 332 U. S. 261, 275; 91 L. Ed. 2043, 2053, in which the validity of a New York special jury was sustained. One of the arguments was that there was a great disparity between the percentage of jurors in each occupation represented on the jury list and the occupational distribution of the number of employed persons in the year 1940 in Manhattan, as shown by the Census. This court said:

"Apart from the discrepancy of five years in the dates of the data and the differences in classification of occupations, the two tables do not afford statistical proof that the jury percentages are the result of discrimination. Such a conclusion would be justified only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable. The percentage of persons employed or seeking employment in each occupation does not establish even an approximate ratio for those of each occupation that should appear in a fairly selected jury panel. The former is not limited, as the latter must be, to those over 21 or under 70 years of age. It is common knowledge that many employed and seekers of employment in New York are not, as jurors must be, citizens of the United States. How many could not meet the property qualifications? How many could not read and write the English language understandingly? It is only after effect is given to these admittedly constitutional requirements that we would have any figures which determined or even suggested the effect of the additional disqualifications imposed on special jurors."

* * *

"It is not unlikely that the requirements of citizenship, property and literacy disqualify a greater proportion of laborers, craftsmen and service employees than of some other classes. Those who are illiterate or, if literate in their own, are unable to speak or write the English language, naturally find employment chiefly in manual work. It is impossible from the defendants' evidence in this case to find that the distribution of the jury panel among occupations is not the result of the application of legitimate standards of disqualification.

"On the other hand, the evidence that there has been no discrimination as to occupation in selection of the panel, while from interested witnesses, whose duty it was to administer the law, is clear and positive and is neither contradicted nor improbable. The testimony of those in charge of the selection, offered

by the defendants themselves, is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue."

These comments of this court are directly applicable to and are controlling in this case.

In *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 90 L. Ed. 1181, and *Ballard* v. *U. S.*, 329 U. S. 187, 91 L. Ed. 181, the jury commissioners deliberately, systematically and intentionally excluded certain groups or classses of people in the selection of the jury panel. In *Glasser* v. *U. S.*, 315 U. S. 59, 86 L. Ed. 68, the validity of the jury was sustained on the ground that the burden of showing the impropriety in the selection of the panel was on the person alleging it, and that the burden had not been sustained. By way of dictum, this court there said that the deliberate selection of all the jurors from the membership of a private organization, thereby excluding all non-members from jury service, would be improper.

All of these authorities hold simply that the jury commissioners are not authorized under the statutes to deliberately and systematically exclude some group or class from the jury panel. Nothing like that is shown or even suggested by the evidence here, and these authorities, therefore, are not in point.

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For the reasons given, the petition for writ of certiorari should be denied.

Respectfully submitted,

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